UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America	)	
	)	
	)	
v.	)	**Criminal No. 14-107 (RCL)**
	)	
Nicholas A. Slatten,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION IN LIMINE TO PRECLUDE MISLEADING ARGUMENTS IN GOVERNMENT'S OPENING STATEMENT

At the first trial, a central premise of the government's case was that there were no insurgents in Nisur Square on September 16, 2007. The government argued in its opening statement that it would prove this fact and asserted in closing that it had done so. In recent submissions, the government has indicated that it intends to make the same argument at retrial. Mr. Slatten respectfully moves to preclude the government from making these or similar arguments in its opening statement.

The government has now disclosed—for the first time in more than nine years and on the eve of retrial—that it possesses information that contradicts these prior assertions. Although the government has provided Mr. Slatten with only terse summaries of some of the underlying classified information, this much is clear: the evidence tends to prove that there was at least one individual with ties to insurgent groups in Nisur Square that day, and that person was the Iraqi official in charge of the investigation underpinning this prosecution. Moreover, the government's notice of additional sealed filings [ECF No. 820] and this Court's order [ECF No. 825] denying

Mr. Slatten's motion to compel [ECF No. 780], suggest that the government possesses information indicating that at least one additional person in Nisur Square was affiliated with an insurgent group.

The government cannot in good faith make an argument it knows to be false or misleading without violating Mr. Slatten's constitutional right to a fair trial. *See Berger v. United States*, 295 U.S. 78, 85 (1935). To mislead the jury on a point as critical as whether individuals with insurgent affiliations were present in Nisur Square on September 16, 2007, while at the same time invoking the state secrets privilege to prevent Mr. Slatten from effectively rebutting this assertion, would be a "deliberate deception of a court and jurors . . . incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972) (internal quotation marks omitted). The Court should preclude the government from unfairly capitalizing on the untenable position in which the government's assertion of privilege has placed Mr. Slatten.

BACKGROUND

For years, the government has maintained that there were "no insurgents" in Nisur Square on September 16, 2007. In its opening statement at the first trial, the government repeatedly made this assertion. *See, e.g.*, 6/17/14 PM Tr. at 59:19 ("There were no threats."); *id.* at 66:5 ("That day there were no threats out there."); *id.* at 13:12-14 ("Every man, woman and child out there that day that either died or suffered an injury posed no threat to these men whatsoever."). The government made similarly broad declarations at closing. *See, e.g.*, 8/27/14 AM Tr. at 26:21-22 ("None of [the victims] were insurgents, none."); *id.* at 39:6-8 ("But you know there were no armed insurgents. You certainly know that none of those victims was an insurgent."); *id.* at 51:4-6 ("None, of all of those people, all of those faces, all of those names on that board that I went through this morning, none of them was an insurgent."); *id.* at 77:18-20 ("Because there were no threats out there, there were no insurgents out there that day.").

Consistent with its approach at the first trial, on remand the government has repeatedly stated that it intends to argue that there were no insurgents in Nisur Square that day. *See* 4/10/18 Hr'g Tr. at 6:7-11 ("[W]e will need to put on witnesses for a variety of reasons, but one of the reasons is to establish that, in fact, there was no threat, either in the form of the white Kia or in the form of insurgents, claimed insurgents."); *id.* at 6:15-21 ("So part of our proof, of course, is going to be . . . that, in fact, there were no insurgents out there."); ECF No. 730 at 9 ("At the upcoming retrial, the government will once again have the weighty burden of showing that, at noon on September 16, 2007, Nisur Square was bereft of armed combatants.").

On February 2, 2018, hoping to challenge the veracity of these categorical assertions, the defense sent a request for discovery to the government. The defense requested, *inter alia*:

> 13. All information (including files of intelligence agencies) regarding whether any of the alleged decedents and injured individuals have any suspected connection or affiliation with any insurgent or terrorist group
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> 14. All information (including files of intelligence agencies) regarding whether any of the Iraqi Police at Nisur Square on September 16, 2007 or any of the Iraqi Police who participated in the Nisur Square investigation have any suspected connection or affiliation with any insurgent or terrorist group

Ex. A at 3. The government did not respond to the request for several months, notwithstanding multiple follow-up requests by the defense. The government finally responded substantively to Mr. Slatten's discovery request on Friday, May 25, at 11:34 pm. The government stated that it had "made the appropriate inquiries to locate potentially responsive materials." Ex. B at 2. It then stated:

> We are not going to confirm or deny whether responsive information exists. Nevertheless, we write to advise you that we do not anticipate producing any materials in response to your February 2, 2018, requests Nos. 13 and 14. We have reached this conclusion after carefully considering our disclosure obligations, including under Fed. R. Crim. P. 16(a)(1)(E) (requiring, upon the defendant's request, the government to disclose documents, among other things, that are within the government's custody or control and that are "material to preparing the defense

> . . . ."), *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1971), and their progeny.

Id. (footnotes omitted). That same day, the government filed a notice of a sealed, *ex parte* filing entitled "Government's Motion for Protective Order Pursuant to Section Four of the Classified Information Procedures Act." ECF No. 771.

Following *ex parte* hearings with the Court, on June 14, 2018, at 5:34 pm, the government disclosed the following two summaries to the defense:

> **SUMMARY #l**
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> The United States Government has information that in 2004, an Iranian Intelligence agent ("agent") was hopeful that he/she could cultivate ties with an applicant to the Iraqi National Intelligence Service. The applicant was referred to as "Lieutenant Colonel Karim" ("Karim"). It is unknown whether this "Karim" is the same individual as Colonel Faris Saai Abdul Karim.
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> "Karim" is described as being 48 years old, married, Sh'ite, tall, dark in complexion with greying hair, and a heavy smoker who quit drinking in approximately 2002. "Karim" joined the Iraqi Intelligence Service in 1980, working in the Military Industries Securities directorate until 2003, when the Iraqi Army disbanded.
>
> The agent had long-standing ties with "Karim" through personal family contacts. The agent served under cover as a member of the Badr Corp. "Karim" knew the agent as a Badr Corp member, and in this context, provided the agent with a steady stream of "information." No additional information is known regarding the nature of the relationship or the type of information provided. In March 2004, "Karim" applied to the Iraqi National Intelligence Service. "Karim" promised the agent he would remain loyal to him and continue their relationship. The agent received money to provide to "Karim," but the reporting does not indicate whether "Karim" ever received any money.
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> **SUMMARY #2**
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> The United States Government has information that in February 2008, an associate of a figure in the Iran-based Jaysh al-Mahdi (JAM) ("associate"), attempted to verify the planning of a raid by United States and Iraqi forces via a "Colonel Karim" ("Karim"), presumably a member of the Iraqi Security Forces. It is unknown whether this "Karim" is the same individual as Colonel Faris Saai Abdul Karim.
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> The reporting is internally inconsistent about whether the associate actually received information about the raid from "Karim," or whether, when asked to verify, "Karim" had no knowledge of the raid. The associate explained to "Karim"

> that even though he ("Karim") was a "brother" and the associate wanted no problems with him, such a raid would result in trouble for the responsible party.

Ex. C.

On June 19, the defense moved to compel production of revised summaries or, in the alternative, to dismiss the indictment. *See* ECF No. 827. In that motion, Mr. Slatten explained that Colonel Karim was present in Nisur Square on September 16, 2007 and oversaw the investigation of the incident. *See id.* at 2-4.

On June 14, the government provided notice that it had filed an additional *ex parte* motion seeking yet another protective order to avoid disclosure of classified information. *See* ECF No. 820. It is impossible for the defense to know what the government sought to avoid disclosing in this *ex parte* filing. It stands to reason, however, that additional information was responsive to Mr. Slatten's February 2 discovery requests, which asked for information about whether individuals present in Nisur Square had terrorist affiliations. And, because the June 14 filing occurred after the government's first *ex parte* motion concerning Colonel Karim, it is likely that the later filing relates to additional victims or investigators of the Nisur Square incident. The Court granted that *ex parte* motion, indicating that Mr. Slatten will not receive additional withheld information. ECF No. 825.

ARGUMENT

The government's argument that there were "no insurgents" in Nisur Square implicates bedrock concerns at the heart of Constitution's due process guarantee. It is improper "for a prosecutor to make an assertion to the jury of a fact, either by way of argument or by an assumption in a question, unless there is evidence of that fact." 3 Charles Alan Wright et al., *Federal Practice & Procedure Criminal* § 588 (4th ed. 2018). Moreover, the government has a "duty to assure the accuracy of its representations," which requires that, "when the government learns that part of its

case may be inaccurate, it must investigate" and, if necessary, correct the record. *United States v. Freeman*, 650 F.3d 673, 680 (7th Cir. 2001). The government "cannot simply ignore" evidence that may contradict its case. *Id.* Misleading or inaccurate arguments by the government will lead to the denial of due process when they affect the "jury's ability to judge the evidence fairly." *United States v. Thomas*, 114 F.3d 228, 246 (D.C. Cir. 1997) (internal quotation marks omitted); *see United States v. Bigeleisen*, 625 F.2d 203, 208 (8th Cir. 1980) (reversing conviction because there was a "reasonable likelihood that the false testimony and misleading closing argument could have affected the judgment of the jury").

The prohibition on misleading argument derives from the fundamental principle that distortion of the fact-finding process by the government will taint a conviction. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (willful or inadvertent suppression of exculpatory or impeachment evidence); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (knowing failure to correct false testimony); *Berger*, 295 U.S. at 85-86 ("improper insinuations and assertions calculated to mislead the jury"); *United States v. Azubike*, 504 F.3d 30, 38 (1st Cir. 2007) (inadvertent factual misstatements in closing); *United States v. Lord*, 711 F.2d 887, 891-92 (9th Cir. 1983) (intimidation of defense witnesses suggesting "distortion of the judicial fact-finding process"). Taken together, these cases stand for the proposition that prosecutors may not exploit the structural advantages they possess as representatives of the government to secure a conviction. Rather, they must recognize "the special role played by the American prosecutor in the search for truth in criminal trials," whose interest "'is not that [he] shall win a case, but that justice shall be done.'" *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (quoting *Berger*, 295 U.S. at 88).

These rules apply with full force to the government in this case. The government cannot argue to the jury that there were "no insurgents" in Nisur Square on September 16, 2007 when there is substantial reason to believe that is not accurate, for three reasons.

First, the government's belated disclosure regarding Colonel Karim alone renders any categorical assertion that there were "no insurgents" in Nisur Square at the time of the incident misleading. As noted above, and more extensively discussed in Mr. Slatten's motion to compel, *see* ECF No. 827 at 2, Colonel Karim said he was in Nisur Square during the incident. He was on the scene after the Raven 23 convoy left. *See id.* The government has now disclosed that unnamed intelligence sources have identified an individual with the same name, rank, and description who was working hand in glove with terrorist organizations and foreign agents adverse to Iraqi and American interests. *See* pp. 4-5, *supra*. Under these circumstances, the government cannot fairly argue that there were "no insurgents" in Nisur Square on September 16, 2007.

Next, the government's June 14 *ex parte* motion raises significant concerns that it may be in possession of information that an additional individual (or individuals) present at the scene had similar ties to insurgent groups. The Court has indicated that the information at issue in the June 14 *ex parte* filing will not be produced, *see* ECF No. 825, and thus presumably has granted the government's *ex parte* motion. Mr. Slatten does not have access to the underlying documents or the Court's deliberations and does not know the individuals to which the information relates. But his discovery requests asked for information about victims of the incident and police officers. If the government possesses information that a victim or a police officer in Nisur Square had insurgent ties, that information contradicts the government's assertion that there were "no